Supreme Court, U.S.
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NO. 91-1296

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER, 1991 TERM

TOM R. STEPHENSON, ON BEHALF OF HIMSELF AND ALL OTHERS SIMILARLY SITUATED,
PETITIONER,

-VS-

THE OKLAHOMA TURNPIKE AUTHORITY,
RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Does the 11th Amendment bar claims against the Oklahoma Turnpike Authority for present and future monetary, declaratory, and injunctive relief asserted under Section 1 of the 14th Amendment, and premised upon a claim of denial of equal protection of law?

2. Does a Federal Court of Appeals have the rulemaking power to withhold precedential effect and value of its opinions by adoption of an "unpublished opinion" rule?

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PETITION FOR WRIT OF CERTIORARI

COMES now Tom R. Stephenson, the Petitioner herein, and, pursuant to Rule 14, petitions this Honorable Court for a Writ of Certiorari.

OTHER OPINIONS: US District Court, Western District of Oklahoma (Appendix A-2); Unpublished Order And Judgment of US Court of Appeals, Tenth Circuit (Appendix A-1).

JURISDICTIONAL GROUNDS: Date of Judgment to be reviewed: November 14, 1991; Rehearing Order: None; Rule 12.3 Cross-Petition: None; Statutory jurisdiction of US Supreme Court: 28 USC §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED:

1. Amendment 11, US Constitution (Appendix A-3).

2. Section 1, Amendment 14, US Constitution (Appendix A-4).
3. Title 69 Oklahoma Statutes, Section 1711 (Appendix A-5).
4. Rule 36.3, US Court of Appeals, Tenth Circuit (Appendix A-6).

STATEMENT OF THE CASE

This case seeks present and future monetary relief, as well as declaratory and injunctive relief, from the Oklahoma Turnpike Authority, under the 14th Amendment to the US Constitution and other applicable federal statutes, based upon the Authority's implementation of a toll collection system which permits a reduction in the rate of toll charged to vehicles within already designated vehicle classes, said toll reduction being based solely upon whether or not turnpike users elect to participate in a toll paying system whereby specified sums of money are deposited "up-front" with the

Authority, with toll deductions then being made from a depositor's account.

The Petitioner, and the class he seeks to represent, are members of the motoring public, within already designated vehicle classes, who use the Authority's turnpikes, but who either cannot afford to pre-pay the specified toll deposit, or who do not desire to pre-pay same, and are thereby denied benefit of the toll reduction afforded other members of the same vehicle class.

Oklahoma law creates the Oklahoma Turnpike Authority as a separate and distinct body corporate and politic, insures its freedom from any financial ties to the general public treasury of the State of Oklahoma, and authorizes the Authority to sue and be sued, and to fix and charge tolls for use of the Authority's turnpikes.

In fixing and collecting of tolls, the Oklahoma law further mandates that there shall be no discrimination against any group or class or individual member thereof. (See applicable Oklahoma law at Appendix A 5).

The Authority has, long since, created reasonable vehicle classes for toll purposes, based upon vehicle size or number of axles, with the larger vehicles paying greater tolls than smaller vehicles, or vehicles with fewer axles. Until January 1, 1991, all vehicles within any designated vehicle class paid the exact same toll for traversing the same distance over the Authority's turnpikes.

On January 1, 1991, the Authority established a new and higher schedule of tolls for all previously created vehicle classes. Contemporaneous therewith, the Authority instituted a toll paying system called "Pikepass", whereby motorists who participate therein are required to deposit "up-front" with the Authority specified sums of money,

thereby allowing "Pikepass" participants access to, and use of, the Authority's turnpikes as reduced tolls, less than the amount of toll charged to other vehicles within the same vehicle class who are not "Pikepass" participants.

The Petitioner's US District Court Complaint alleges that this dual toll system and structure, within already designated vehicle classes, is a violation of the applicable Oklahoma law, and, as such, is openly discriminatory and a denial of equal protection of the laws guaranteed by Section 1 of the 14th Amendment to the US Constitution.

The Authority moved to dismiss Petitioner's Complaint claiming, inter alia, that Petitioner's equal protection claims asserted under the 14th Amendment are barred by the 11th Amendment. The District Court agreed and ordered the case dismissed. (See District Court Order at Appendix A 2).

Timely appeal was perfected to the US Court of Appeals for the Tenth Circuit, which, in a three paragraph non-precedential Order And Judgment, entered pursuant to Tenth Circuit Rule 36.3, affirmed the District Court, and held that Petitioner's 14th Amendment claims are barred by the 11th Amendment. (See Tenth Circuit Judgment at Appendix A-1).

STATE COURT JUDGMENT TO BE REVIEWED: None.

JURISDICTION OF COURTS BELOW:

1. District Court: 14th Amendment, 42 USC §1983, 28 USC §§ 1331, 1343(3), 1343(4) and 2202.
2. Tenth Circuit: 28 USC §1291.

ARGUMENT FOR ALLOWANCE OF WRIT OF CERTIORARI

A. THE TENTH CIRCUIT'S DECISION IS IN DIRECT CONFLICT WITH A DECISION OF THE SEVENTH CIRCUIT ON THE SAME ISSUE.

Petitioner seeks relief under Section 1 of the 14th Amendment, alleging a denial of equal protection of the laws. The relief is sought against the Oklahoma Turnpike Authority, a body corporate and politic, created by the statutes of the State of Oklahoma, which, by law, can sue and be sued. Eventhough the Authority has no financial ties to the general treasury of the State of Oklahoma, the District Court below dismissed Petitioner's Complaint, holding that his equal protection claims are barred by the 11th Amendment.

As the matter now stands in the Tenth Circuit, equal protection claims asserted under Section 1 of the 14th Amendment are barred by the 11th Amendment. However, in the Seventh Circuit, such claims are specifically approved, and the 11th Amendment is not a bar. See US v Board of School Commissioners of Indianapolis, Ind., 503 F2d 68, at page 82 (7th Cir. 1974).

There is, therefore, a direct conflict between the circuits on this issue, and a resolution thereof from this Court is needed.

B. THE TENTH CIRCUIT HAS DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW IN A WAY THAT CONFLICTS WITH A DECISION OF THE US SUPREME COURT.

In a relatively recent opinion, this Court has had an occasion to address the issue of whether or not the 11th Amendment is a bar to the

assertion of present, continuing, and future denial of equal protection claims (as does the Petitioner's Complaint in this case). This Court has held that the 11th Amendment does not afford immunity to such claims and is not a bar to the assertion thereof. See Papasan v Allain, 478 US 265 (1986).

The Tenth Circuit's decision in this case, is, therefore, in conflict with recent decisions of this Court, and review should be granted to correct the error.

C. THE TENTH CIRCUIT'S "UNPUBLISHED OPINION" RULE IS IN CONFLICT WITH THE RULES OF OTHER CIRCUITS AND EXCEEDS ITS RULEMAKING AUTHORITY.

The Tenth Circuit's Order And Judgment in this case was entered pursuant to its Rule 36.3, commonly called the "unpublished opinion"

rule (See text of Rulw 36.3 at Appendix A-6).

It is respectfully submitted that federal courts of appeals lack the rulemaking power to withhold precedential effect and value of their opinions by the adoption of such a rule.

Scholors have addressed the issue (See Unreported Decisions In The US Courts of Appeals, 63 Cornell L. Rev. 128, and The Non-Precedential Precedent, 78 Col. L. Rev. 1167), and have acknowledged the existence of a non-uniform policy on the subject, and have concluded that there should be uniformity among the circuits.

Additionally, in dissenting to the adoption of Rule 36.3, Tenth Circuit Chief Judge Holloway, joined by Judges Barrett and Baldock, assert

their opinion of the unsoundness of such a rule. (See Dissenting Opinion at US Court of Appeals, 10th Circuit Rules, App. III, 28 USCA West Supp. 1988).

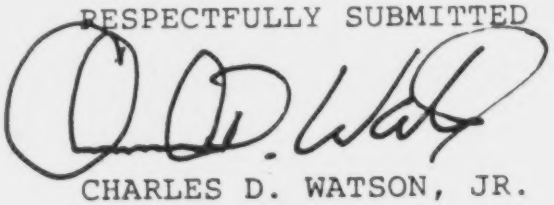
This Court has previously granted certiorari on this issue, but did not address the issue in its opinion (See Bowder v Director, Dept. of Corrections of Ill., 434 US 257 (1978).

Now is the time, and this is the case, to address the issue, and adopt a uniform policy prohibiting the "no-citation" rules.

Petitioner's Complaint states valid, judicially cognizable claims for relief, and the courts below have erred in applying 11th Amendment immunity as a bar to those claims.

WHEREFORE, Petitioner prays that his Petition For Writ of Certiorari be granted.

RESPECTFULLY SUBMITTED



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UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

TOM R. STEPHENSON, on behalf of himself and all others similarly situated, Plaintiff-Appellant, v. THE OKLAHOMA TURNPIKE AUTHORITY Defendant-Appellee.	FILED NOV 14 1991 ROBERT . HOECKER Clerk No.91-6162 (D.C.No.CIV-91-5-W) (W.D.Okla.)

ORDER AND JUDGMENT*

Before ANDERSON, BRORBY, and TACHA, Circuit Judges.

After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist the determination of this appeal. See Fed. R. App. P. 34(a); 10th Cir. R. 34.1.9.

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* This order and judgment has no precedential value and shall not be cited, or used by any court within the Tenth Circuit, except for purposes of establishing the doctrines of the law of the case, res judicata, or collateral estoppel. 10th Cir. R. 36.3.

The case is therefore ordered submitted without oral argument.

Appellant Tom R. Stephenson appeals a district court order dismissing his complaint. The district court held that Stephenson's suit against the Oklahoma Turnpike Authority was barred by the eleventh amendment. On appeal, Stephenson argues that the Turnpike Authority has waived its eleventh amendment immunity by consenting to suit. Stephenson also argues that equal protection claims are not barred by the eleventh amendment.

After carefully reviewing the record, we AFFIRM for substantially the same reasons given by the district court. The mandate shall issue forthwith.

ENTERED FOR THE COURT

Deanell Reece Tacha
Circuit Judge

IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF OKLAHOMA

TOM R. STEPHENSON, On Behalf Of Himself And All Others Similarly Situated,	)	FILED MAR 28 1991 Robert D. Dennis Clerk, US District Court
Plaintiff,	)	
vs.	)	No. CIV-91-05-W
THE OKLAHOMA TURNPIKE AUTHORITY,	)	
Defendant.	)	

ORDER

This matter comes before the Court on the Motion to Dismiss, or Abstain filed by the defendant, the Oklahoma Turnpike Authority (the Authority), wherein the Authority has requested the Court to dismiss the plaintiff's claim or in the alternative, to abstain from proceeding in this action until an Oklahoma state court has had the opportunity to rule on the issues raised in this litigation. The plaintiff,

Tom R. Stephenson, on behalf of himself and all others similarly situated, [1] has responded in opposition to the motion and based upon these submissions, the Court makes its determination. In so doing, the Court finds the issue of immunity under the eleventh amendment to the United States Constitution dispositive of this matter and thus, has not considered the other arguments raised by the parties.

This lawsuit arises over the Authority's decision to institute its "Pikepass" program. Under this program, members of the motoring public who desire to use state turnpikes may purchase an electronic device which permits easier access to the turnpikes. The plaintiff has argued that the purchasers of these electronic devices not only have paid reduced turnpike tolls but also will not be subjected to any toll increases. The plaintiff, who has brought this lawsuit under title 42, section 1983 of the United States Code, has contended

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[1] In his complaint, the plaintiff has sought certification of a class under Rule 23, F.R. Civ. P.

that the Authority has acted arbitrarily, discriminatorily and in violation of the equal protection clause of the fourteenth amendment to the United States Constituion and in violation of title 69, section 1711 of the Oklahoma Statutes.

The Authority is a statutorily-recognized instrumentality of the State of Oklahoma.[2] 69 O.S. § 1703 (a). A suit generally may not be maintained directly against the state itself or against an agency or department of the state unless the state has waived its eleventh amendment immunity and this bar to suit applies whether the relief sought is legal or equitable in nature.

The plaintiff has argued that the Authority has waived its immunity to suit and in support of this argument, has cited title 69, section 1703 (a) of the Oklahoma Statutes

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[2]The Court finds irrespective of the eleventh amendment, the plaintiff's suit for monetary relief under section 1983 is barred by the United States Supreme Court's decision in Will v. Michigan Department of State Police, 491 U.S. 58 (1989) (states are not "persons" under section 1983). States however do qualify as "persons" under section 1983 when suit is for injunctive relief.

which provides that "the Authority may sue and be sued. . . . " 69 O.S. § 1703 (a). This general waiver of sovereign immunity however has been narrowly circumscribed by title 69, section 1705 (d) of the Oklahoma Statutes which provides that the Authority is empowered

> "[t] o sue and be sued in contract, reverse condemnation, equity, mandamus and similar actions in its own name . . . . "

Id. § 1705 (d).

> "In deciding whether a State has waived its constitutional protection under the Eleventh Amendment, . . . waiver [will be found] only where stated 'by the most express language or by such overwhelming implications from the text as [will] leave no room for any other reasonable construction.' "

Edelman v. Jordan, 415 U.S. 651, 673 (1974) (quoting Murray v. Wilson Distilling Co., 213 U. S. 151, 171 (1909)). Furthermore, a state's general waiver of sovereign immunity that might subject it to suit in state court is not enough to waive the immunity guaranteed by the eleventh amendment. E.g.,

Florida Department of Health & Rehabilitative Services v. Florida Nursing Home Ass'n, 450 U.S. 147, 150 (1981) (per curiam).

The Court finds that section 1705 (d) is not a general and unlimited waiver of suit in both state and federal court; rather, the authority "to sue and be sued" is limited to certain express exceptions: contract, reverse condemnation, equity, mandamus and similar actions. That portion of the instant lawsuit which seeks compensatory and punitive damages for constitutional violations does not come within one of these receognized exceptions.

The Court finds further that although the plaintiff's requested injunctive relief might arguably fall within the recognized exception for cases in equity, this suit is nevertheless barred in federal court. While the State of Oklahoma may have waived its sovereign immunity to certain suits in state court, there

is no unequivocal and express declaration or any overwhelming implication that the State of Oklahoma intended to waive any rights under the eleventh amendment to the United States Constitution. Cf. 51 O.S. § 152.1 (as to tort causes of action, state and its instrumentalities waive sovereign immunity, but in so doing, "it is not the intent of the state to waive any rights under the Eleventh Amendment. . . .").

Accordingly the Court finds that the defendant's Motion to Dismiss should be and is hereby GRANTED.

ENTERED this 28th day of March, 1991.

/s/ Lee R. West

LEE R. WEST
UNITED STATES DISTRICT JUDGE

CONSTITUTION OF THE

UNITED STATES

AMENDMENT XI

The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

CONSTITUTION OF THE

UNITED STATES

AMENDMENT XIV - SECTION 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process or law; nor deny to any person within its jurisdiction the equal protection of the laws.

§1711 - TOLLS, CONTRACTS FOR USE OF PORTIONS OF PROJECT, RENTS AND CHARGES, USE OF REVENUES, SINKING FUNDS, REGULATION OF MOTOR CARRIERS.

*** The Authority shall not discriminate against any group or class or individual member thereof in fixing the amount of toll, rents, or charge for the use of the turnpike project.

US COURT OF APPEALS

TENTH CIRCUIT

RULE 36.3

36.3 CITATION OF UNPUBLISHED OPINIONS/ORDERS AND JUDGMENTS.

Unpublished opinions and orders and judgments of this court have no precedential value and shall not be cited, or used by any court within the Tenth Circuit, except for the purposes of establishing the doctrines of the law of the case, res judicata, or collateral estoppel. A dissent from this rule by Chief Judge Holloway, Judges Barrett, and Baldock, appears at US Court of Appeals, 10th Circuit Rules, App. III, 28 USCA (West Supp. 1988).